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No. 02-516

IN THE

Supreme Court of the United States

JENNIFER GRATZ, ET AL.,

Petitioners,

v.

LEE BOLLINGER, ET AL.,

Respondents.

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR *AMICUS CURIAE* NATIONAL ASSOCIATION OF SCHOLARS IN SUPPORT OF PETITIONERS

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BRIEF FOR *AMICUS CURIAE*
NATIONAL ASSOCIATION OF SCHOLARS
IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

The National Association of Scholars is an organization comprising professors, graduate students, administrators, and trustees at accredited institutions of higher education throughout the United States.[1] NAS has more than 4,300 members, organized into 46 state affiliates,

[1] Pursuant to Supreme Court Rule 37.3(a), all parties have filed with the Court their written consent to the filing of all *amicus curiae* briefs. Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* NAS certifies that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than NAS, its members, and its counsel has made a monetary contribution to the preparation and submission of this brief.

and includes within its ranks some of the nation's most distinguished and respected scholars in a wide range of academic disciplines.

The purpose of NAS is to encourage, to foster, and to support rational and open discourse as the foundation of academic life. More particularly, NAS seeks, among other things, to support the freedom to teach and to learn in an environment without politicization or coercion, to nourish the free exchange of ideas and tolerance as essential to the pursuit of truth in education, to maintain the highest possible standards in research, teaching, and academic self-governance, and to foster educational policies that further the goal of liberal education.

NAS opposes racial, ethnic, and sex-based preferences in faculty hiring and student admissions because it believe hat such preferences are inimical to the principles to which NAS is dedicated and to the American ideal of equality of opportunity without regard to race or color, to which NAS's members are committed. NAS views with great concern the impact that the institutionalization of racial, ethnic, and sex-based preferences has had on higher education and on American society.

NAS submits this brief, as it did in both the district court and the court of appeals, for the purpose of refuting the Report of Patricia Y. Gurin. That report is the principal evidence submitted by the University of Michigan and relied upon by the district court in support of the University's argument and the Court's conclusion that the pursuit of racial "diversity" in a student body is a compelling governmental interest. NAS has published a study refuting the Gurin Report. *See* Thomas E. Wood & Malcolm J. Sherman, *Is*

Campus Racial Diversity Correlated With Educational Benefits? (Apr. 4, 2001) (the "NAS Study").[2]

NAS has also submitted an *amicus curiae* brief in companion case *Gutter v. Bollinger,* No. 02-241, pointing out that the "educational judgment" claimed to support the University of Michigan's racial-preference admissions policy is unsupported by the facts, inconsistent with the law, and perverse in its results. NAS respectfully requests that the arguments made therein also be taken into consideration in this case.

SUMMARY OF ARGUMENT

The district court concluded that "a racially and ethnically diverse student body produces significant educational benefits such that diversity, in the context of higher education, constitutes a compelling governmental interest under strict scrutiny." Pet. App. 27a-28a. To reach this conclusion, the court relied on what it termed the "solid evidence" provided by the University, and *amici* supporting the University's position, "regarding the educational benefits that flow from a racially and ethnically diverse student body." *Id.* at 22a. That evidence consisted primarily of the Gurin Report – a report solicited specifically for this litigation and prepared by Patricia Y. Gurin, professor of psychology and women's studies at the University of Michigan and interim dean of the University's College of Literature, Science and the Arts. Judge Duggan quoted the Report as concluding that "'[s]tudents learn better in a diverse educational environment, and they are better prepared to become active participants in our pluralistic, democratic

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[2] This study is Part IV of a larger work entitled *Race and Higher Education, available at* nas.org/rhe.html. The NAS submitted Part IV of *Race and Higher Education* to the court of appeals as a separate Addendum to its *amicus curiae* brief in this case.

society once they leave such a setting.'" *Id.* (quoting Gurin Rep., at 3).[3]

No such conclusion can rationally be drawn from Professor Gurin's study. She simply did not assess whether a racially diverse student body affects learning (or citizenship). And her measurements of better learning and citizenship, whatever they may have resulted from, are dubious.

What the Gurin Report actually measures is whether taking race/ethnic studies classes, engaging in conversations about racial issues, and having friendships that cross racial lines affect students' attitudes about a number of things. Some of these might generously be thought to bear on better or worse learning or preparation for citizenship, but they relate much more to students' political views and their assessments of their own worth. Professor Gurin's study might thus be helpful to a university that wanted to know whether ethnic-studies courses affect students' political views and self-esteem. It is quite irrelevant, however, to the question here: whether racial diversity of a student body (let alone racial diversity achieved through racial preferences) results in educational benefits of such a magnitude that the achievement of them can be said to constitute a compelling governmental interest. Moreover, other studies using Gurin's primary database to compare student racial diversity and educational benefits have found no relationship.

Although the district court referred to NAS's critique of the Gurin Report (Pet. App. 27a), it dealt with it only glancingly. The court failed to come to terms with the NAS

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[3] The Gurin Report cited to in this brief appears at the court of appeals record number 84. The Gurin Report also appears in abbreviated form in Patricia Gurin, *Reports Submitted on Behalf of the University of Michigan: The Compelling Need for Diversity in Higher Education*, 5 MICH. J. RACE & L. 363 (1999).

critique and consequently failed to explore the manifold weaknesses of the Gurin Report and, ultimately, to apprehend its irrelevance to the issue presented by this case. Once the Gurin Report is discredited, the main bulwark of the district court's finding that student-body racial diversity yields educational benefits disappears, and with it the court's ultimate conclusion that the racial preferences that produce this diversity are constitutional.

ARGUMENT

I. THE UNIVERSITY BEARS A HEAVY BURDEN TO DEMONSTRATE THAT ITS USE OF RACIAL PREFERENCES SERVES A COMPELLING GOVERNMENTAL INTEREST.

The Fourteenth Amendment to the Constitution provides that "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV § 1. Because the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual," *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948), "a [state's] racial classification causes 'fundamental injury' to the 'individual rights of a person,'" *Shaw v. Hunt*, 517 U.S. 899, 908 (1996) (internal citation omitted).

Accordingly, this Court's precedents set a high hurdle for any state actor that wishes to apply a race-based classification: the state actor must demonstrate that its racial classification advances a "compelling governmental interest[ ]" and that its use of race is "narrowly tailored" to meet that interest. *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 227 (1995); *see also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989) (plurality opinion) (same).

Mere recital of a compelling governmental interest is not enough; the state must provide a "strong basis in

evidence for its conclusion" that its use of race advances a compelling governmental interest. *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 277 (1986) (plurality opinion); *Croson*, 488 U.S. at 500. The Gurin Report provides no such evidence: it does not show that student racial diversity (much less that achieved by racial preferences) creates any educational benefits. Because the Gurin Report is irrelevant to this litigation, it cannot help the University meet its burden.

II. THE GURIN REPORT DOES NOT SHOW THAT INCREASED STUDENT RACIAL DIVERSITY YIELDS EDUCATIONAL BENEFITS.

The district court relied on the Gurin Report in finding that student racial diversity results in educational benefits: "Gurin reports that . . . '[s]tudents who experienced the most racial and ethnic diversity in classroom settings and in informal interactions with peers showed the greatest engagement in active thinking processes, growth in intellectual engagement and motivation, and growth in intellectual and academic skills.'" Pet. App. 23a (quoting Gurin Rep., at 5).

Gurin's report does not support her claims. The Report purports to measure the relationship between student-body racial diversity and educational quality at the University of Michigan. *See* Gurin Rep., at 3-4. It does nothing of the sort.

Gurin did not compare her alleged educational benefits with the number or proportion of Asian, African-American, Hispanic-American, Native American, and white students at the University of Michigan or any other institution. Instead, she relied on students' answers to questions about whether they had enrolled in ethnic studies courses, had discussed racial issues, or had close friends of a different race. Her chosen measurement (or variable, to use

the statistician's phrase) was not the extent of racial diversity in the student's university community but how much that student talked (or was talked to) about race and racial issues, in class and out.

As for the outcome – the educational benefits said to result from this talking about race – it is hard to find any evidence in Professor Gurin's study of the "growth in intellectual and academic skills" that she claims. She did not report effects on grades, standardized test scores, or graduate-school admission rates. Instead, she looked to students' answers to questions such as whether they believe "causes of behavior often form [a] chain that goes back in time" or how important they think it is to "[w]rite original works" or whether they are satisfied with themselves. Because Gurin did not even look at student-body racial diversity and did not measure improvements in educational outcomes, her study says nothing about whether the latter follows from the former. Her study is therefore irrelevant to this case.

A. The Gurin Report Does Not Measure Racial Diversity in Student Bodies.

If Gurin wished to study the effects of racial diversity in college student bodies, her first step should have been to gather information on the number and proportion of Asian, African-American, Hispanic-American, Native American, and white students in a number of different universities or at different times. She had before her, in one of the three databases she used for her study, information that would have enabled her to compare the extent of such diversity at a large number of colleges and universities.[4] She chose not to use

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[4] Gurin used three datasets. The Cooperative Institute Research Program ("CIRP") database records the number of "Asian," "black," "Mexican-American/Chicano," "Puerto Rican American," "American Indian," and "white" students at 184 colleges, *see* Robert Lerner & Althea K. Nagai, A Critique of the Expert Report of Patricia Gurin in *Gratz v. Bollinger*, at (...continued)

this information to measure student racial diversity. Instead, she seized upon student answers to questions about ethnic studies, racial dialogue workshops, and interracial experiences, and named those answers "diversity experiences," even though they are unrelated to actual racial diversity in the student body. The Report asked whether a student:

1. enrolled in the Intergroup Relations, Community, and Conflict Program ("IGRCCP") ethnic studies course;[5]

2. "[e]nrolled in an ethnic studies course" and "discussed racial issues";

3. "[e]nrolled in an ethnic studies course" and "attend[ed] a racial/cultural awareness workshop";

4. "[h]ad a course that had [an] important impact on [his or her] views of racial/ethnic diversity and multiculturalism," and participated in racial "dialogue groups" at the University of Michigan;

5. "[h]ad a course that had [an] important impact on [his or her] views of racial/ethnic diversity and multiculturalism," and was involved "with groups and activities [at the University of the Michigan] reflecting other cultural/ethnic backgrounds";

6. "[h]ad a course that had [an] important impact on [his or her] views of racial/ethnic diversity and multiculturalism," and attended "multiethnic [themed] campus events";

7. "[e]nrolled in an ethnic studies course" and "[s]ocialized with someone from a different racial/ethnic group";

8. "[e]nrolled in an ethnic studies course" and had "close friends in college who were of [a different] race";

9. "[h]ad a course that had [an] important impact on [his or her] views of racial/ethnic diversity and multiculturalism," "[h]ad meaningful, and honest discussions about race and ethnic relations" with other-race students, and "[s]hared personal feelings and problems";

10. "[h]ad a course that had [an] important impact on [his or her] views of racial/ethnic diversity and multiculturalism," and, of his or her "six closest friends at Michigan," how many were of a different race.[6]

(...continued)
24, *available at* ceousa.org, and the percentage of the student body that is non-white, *see* NAS Study, at 88. Gurin performed four separate analyses of the CIRP data, and included approximately sixty CIRP measurements, but she never used the CIRP measurements of student-body racial diversity. *See* Gurin Rep. App. C, at 6.

The other two data sets – the Michigan Student Survey ("MSS") and Intergroup Relations, Community, and Conflict Program ("IGRCCP") – include no such data. They cover one class of students at the University of Michigan. Because racial composition is a constant in these databases, Gurin could not use them to measure changes in racial diversity in the student body. *See* Gurin Rep. App. C, at 7, 9.

[5] Gurin describes this as a course on "the history of group experiences in the United States, a contemporary analysis of group inequalities in the economic, educational, and political arenas, and an analysis of political issues and policies (such as immigration, bilingual education, affirmative action, sexual harassment, Middle East peace initiatives) . . . ." Gurin Rep. App. C, at 9-10.

[6] Measurement (1) is drawn form the IGRCCP database. *See* Gurin Rep. App. C, at 21. Measurements (2), (3), (7), and (8) are drawn from the CIRP databse. *See* Gurin Rep. App. C, at 6-7, 13. Measurements (4), (...continued)

The fact that Gurin labeled these measurements as "classroom diversity" and "informal interactional diversity" experiences, does not make them relevant to this litigation. They tell us nothing about actual student racial diversity at the University of Michigan or elsewhere. The first six – enrolling in an ethnic-studies course, discussing race, participating in workshops or dialogue groups, and attending cultural activities or multi-ethnic events – do not require the presence on campus of *any* students of another race.

As for the last four questions, affirmative answers presuppose the presence of *some* students of another race on campus. But the Gurin Report does not indicate how many such students must be present to achieve the effects reported or what races must be represented or in what proportions. Therefore, affirmative answers to those questions say nothing about the particular form of racial diversity that is fostered by the University. Nor do affirmative answers indicate that the other-race students whose presence is implied will not be there absent racial preferences. As Gurin must concede, some of her claimed benefits are attributable to the presence of students who receive no preferences from the University (*e.g.*, Asians, whites, Arabs).[7] Even though these claimed

(...continued)
(5), (6), (9), and (10) are drawn from the MSS database. *See* Gurin Rep. App. C, at 9, 18-19.

[7] Although Gurin did not reveal what percentage of her outcomes results from the presence of Asian and white students – students who receive no racial preference – her Report estimates that the percentage is quite large. The University's white students, who "come from the most segregated backgrounds and hence have the most to learn from the racial/ethnic diversity they find at Michigan," Gurin Rep. App. E, at 2, report that most of their interaction with other-race students is with Asians, Gurin Rep. App. E, at 3. For "students of color," Gurin attributed their high number of "interracial relationships [to] the predominance of white students on the Michigan campus." Gurin Rep. App. E, at 3-4. Since a large percentage of Gurin's results are thus completely independent of the
(...continued)

benefits are independent of racial preferences, the University erroneously credits them to its admissions programs. *See* G.E. Zuriff, *Is Racial and Ethnic Diversity Educationally Beneficial?*, WORLD & I, Aug. 2002, at 271, 273 (discussing this error).

Perhaps recognizing that her "diversity" measurements are irrelevant to the issue in this litigation, Gurin attempted to save them by claiming that, because student racial diversity correlates with her ten measurements and her ten measurements correlate with educational benefits, student racial diversity must correlate with educational benefits. *See* Gurin Rep., at 30-33.[8] Gurin could not possibly mean to argue that everything that correlates with her "diversity experiences" improves education at the University. For example, two of Gurin's "diversity experiences" include taking an ethnic studies course coupled with participating in a racial-dialogue group or workshop. *See id.* App. C, at 13, 18-19. Many schools, including the University of Michigan, offer such dialogue groups and workshops as a "remedy" for a hostile racial climate.[9] According to Gurin's reasoning, because a hostile racial climate correlates with her measurements, it must improve

(...continued)
University's racial preferences, the district court erred in relying on these results in assessing the effects of the University's racial preferences.

[8] As noted above, one of Gurin's databases includes information on racial diversity of the student body. (The Gurin Report calls this "structural diversity." *See* Gurin Rep., at 30.) But, as also noted above, Gurin never used this information on student racial diversity in her study, *see id.* App. C, at 6; she only noted that it sometimes correlates with her ten "diversity" measurements, *see id.* at 31-32.

[9] *See, e.g.*, DINESH D'SOUZA, ILLIBERAL EDUCATION: THE POLITICS OF RACE AND SEX ON CAMPUS 138-41 (1991) (reporting that the University of Michigan instituted racial sensitivity workshops in response to racist incidents at the undergraduate radio station).

education at the University. Not only does Gurin's reasoning violate the rules of logic; it violates the rules of statistics as well. *See* NAS Study, at 82 (providing a mathematical and statistical refutation of Gurin's claims).[10]

If Gurin had wished to measure whether student racial diversity produces educational benefits, she should have actually compared the two not used other, irrelevant measurements. This would not have been difficult; Gurin's primary database includes this information, yet she chose not to use it. The reason why is not hard to find: Using the same database as Gurin, Alexander Astin, Director of the Higher Education Research Institute at UCLA, compared student-body racial diversity and educational benefits and found no relationship between them. *See infra* Part IV.

The district court recited some of NAS's basic criticisms of the Gurin Report without responding to them. *See* Pet. App. 27a. It essayed an answer to just one of the points made by NAS (restated here at p. 10 & n.7 above), that the Gurin Report gives us no idea how many minority students are needed to achieve any beneficial educational results or whether racial preferences are needed to provide the requisite diversity. This argument, the court said, goes

[10] The NAS Study explains that "the argument is unsound, because it can be shown mathematically that if variables A and B are positively correlated, and variables B and C are positively correlated, it is possible that A and C are negatively correlated. To be sure, one can deduce that A and C are positively correlated if one knows that the correlations between A and B and between B and C are very high (near 1). But Gurin's correlations are less (usually much less) than .25, which isn't nearly large enough . . . logically or mathematically." NAS Study, at 82. Wood and Sherman have recently issued a study analyzing the data from the same database Gurin used. Their analysis demonstrates that the indirect correlations Gurin reported are indeed too small for Gurin to claim her "diversity" measurements correlate with her "education" outcomes. *See* Thomas E. Wood & Malcolm J. Sherman, *Supplement to Race and Higher Education*, *available at* nas.org.rhe2.html.

only to "whether the means employed to achieve [the compelling governmental interest of educational benefits] are narrowly tailored." *Id.* Not so. Unless we know how diverse, and in what way diverse, a student body must be to yield the desired educational benefits, we cannot know that the racial preferences chosen to achieve those benefits will survive the strict scrutiny that compelling-interest analysis demands.

B. Gurin's "Learning" and "Democracy Outcomes" Do Not Measure Educational Benefits.

The Gurin Report purports to "confirm[ ] that racial diversity and student involvement in activities related to diversity have a direct and strong effect on learning." Gurin Rep., at 9. But Gurin could not possibly have reached any conclusions on academic outcomes, for the simple reason that she never measured them.

Gurin rejected accepted, traditional measurements of academic outcomes in favor of her own, subjective, ones. Even though her database includes data on such traditional measurements of academic achievement as self-reported grades, graduation rates, admissions to graduate school, and performance on seven standardized tests, *see* ALEXANDER W. ASTIN, WHAT MATTERS IN COLLEGE? 188-99, 218-20 (1993), Gurin chose to include only one of those measurements – self-reported grades (Gurin Rep. App. C, at 14) – which she reported has no "consistent relationship[ ]" with student outcomes. Gurin Rep., at 38.[11] Thus, Gurin found no

[11] Gurin looked for 24 possible relationships between her "diversity" measurements and grades. For only 6 of these did Gurin report results; for the other 18, Gurin found *no* relationship. Moreover, these 6 factors indicate that her "diversity" measurements have almost no impact on grades; even very large increases in these measurements lead to extremely small changes in grades. *See* Gurin Rep. App. D tbl. D1, at 2, (...continued)

consistent link between her purported measurements for racial diversity and the only even arguably objective[12] measurement of academic achievement in her study.

Gurin instead created eleven of her own, subjective measurements of students' political and social attitudes and self-esteem. Although these measurements are unrelated to academic outcomes, Gurin labeled them "learning outcomes." These measurements include:

1. whether students "[e]njoy analyzing reasons for behavior," "[p]refer simple rather than complex explanations," and "[t]ake people's behavior at face value";

2. whether they "[t]hink about the influence of society on other people" and on themselves, and believe "[c]auses of behavior often form [a] chain that goes back in time";

3. how much they valued "[g]eneral knowledge," and "problem-solving," thinking, writing, and foreign language skills;

4. how personally important it was to them to "[w]rite original works (poems, novels, short stories, etc.)" and "[c]reate artistic works (painting, sculptures, decorating, etc.)";

(...continued)
row 1. Finally, Gurin's results are inconsistent with one another, or with any theory of the beneficial effects of student racial diversity adopted by the district court: Gurin found that increases in "diversity courses" correlate with African-Americans reporting *lower* grades and with Hispanics and whites reporting *higher* grades. Gurin Rep., at 38.

[12] The fact that the grades she used are *self-reported* adds an element of subjectivity to that measurement as well.

5. whether they were intellectually satisfied with their education at the University;

6. whether they expected to attend graduate school;

7. whether they wanted to attend graduate school;

8. whether they thought they had a greater "[d]rive to achieve" and intellectual "[s]elf-confidence" than the average person their age;

9. whether they had greater academic, writing, and listening abilities than the average person their age;

10. whether they thought they were more prepared for graduate school than when they entered college;

11. whether they had more "[g]eneral knowledge" and better "problem-solving," thinking, writing, and foreign language skills than when they entered college.[13]

Gurin mislabeled her measurements as "[s]ocial historical thinking," "[c]omplex thinking," and "[i]ntellectual engagement variables," even though, overall, they tell us nothing about students' thinking abilities or intellectual skills.

In measurements (1), (2), (3), and (4), students were asked a little about what they think about, but mostly about what kind of thinking or other intellectual activity they "enjoy" or "value." They certainly did not ask whether students are capable of or engage in Gurin's "complex

[13] Measurements (3), (4), (7), (8), (9), (10), and (11) are drawn from the CIRP database. *See* Gurin Rep. App. C, at 14-16. Measurements (1), (2), (5), and (6) are drawn from the MSS and IGRCCP databases. *See* Gurin Rep. App. C, at 19, 21.

thinking" or even her "social historical thinking." Measurement (5) asked students if they enjoyed their time at the University and found classes satisfying, not whether they did well. Measurements (6) and (7) asked students whether they wish to attend graduate school, not whether and where they were actually admitted. That is a separate measurement in Gurin's database – a measurement that Gurin excluded. *See* ASTIN, *supra*, at 197-98. And measurements (8), (9), (10), and (11) merely assessed students' self-esteem. The fact that students believe they are better writers and "problem solvers" than they were four years earlier does not make it so. Such self-assessments are inherently suspect. *See* Justin Kruger & David Dunning, *Unskilled and Unaware of It: How Difficulties in Recognizing One's Own Incompetence Lead to Inflated Self-Assessments*, 77 J. PERSONALITY & SOC. PSYCHOL. 1121, 1123-24 (1999) (finding that those who were most confident of their abilities were often the least able).

Common sense indicates that these are not valid measurements of educational benefits. Nowhere in society – not in graduate school admissions, college rankings, job recruitment – do we measure a student's academic success by asking him how much he personally values creating artistic works or whether he enjoys guessing the reasons for people's behavior. Very few parents would be likely to accept a transcript that reported not grades, but their child's self-ratings of his abilities and drive to achieve. This Court likewise should not do so.

In addition to her "learning outcomes," Gurin provided over a dozen "democracy outcome" measurements – measurements of students' political and social attitudes and citizenship. These are, on their face, irrelevant; Gurin did not even claim that they measure academic outcomes. Instead they measure how effective the University's courses are in changing students' political and social views.

These measurements range from the extraordinarily bland and uncontroversial (*e.g.*, whether the respondent considers others' perspectives,[14] volunteers in his community,[15] or values "racial understanding"[16]), to the political (*e.g.*, whether the respondent "think[s] about the amount of power people in different segments of society have"[17]). Gurin went so far as to define a positive outcome as a belief that the University's diversity programs are beneficial, and a negative outcome as a response that these programs "foster[ ] more intergroup division than understanding" and lead to tense, uncomfortable discussions on "ethnic, racial, and gender issues."[18] These measurements tell us more about Gurin's political views than they do about education at the University.

Gurin attempted to save her "democracy outcomes" by linking them to education at the University. Education, she explained, "equip[s] students for meaningful participation" in a democracy by making them "better able to understand and consider multiple perspectives, deal with the conflicts that different perspectives sometimes create, and appreciate the common values and integrative forces that harness differences in pursuit of the common good. Students can best develop a capacity to understand the ideas and feelings of others in an environment characterized by diverse others . . . ." Gurin Rep., at 5-6; *accord id.* at 29.

But racial diversity is not necessary to any of these outcomes. Students can listen to "multiple perspectives" and

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[14] Gurin Rep. App. C, at 20 (MSS), 21 (IGRCCP).

[15] Gurin Rep. App. C, at 16 (CIRP).

[16] Gurin Rep. App. C, at 17 (CIRP).

[17] Gurin Rep. App. C, at 21-22 (IGRCCP).

[18] Gurin Rep. App. C, at 20 (MSS).

learn to be considerate of others with or without a racially diverse student body. The diversity Gurin describes as good for democracy – diversity of viewpoint – is very different from the diversity of skin color that the University seeks to achieve.

C. At Most, the Gurin Report Shows Only Tiny Differences in Attitudes Between Students with "Diversity Experiences" and Those Without Them.

The Gurin Report does not even show a significant relationship between students' "diversity experiences" and the educational benefits she purported to measure. This is all the more remarkable because, as discussed later at Part III, Gurin violated basic statistical rules to strengthen such a relationship. In the end, Gurin's own numbers indicate that changes in her "diversity" measurements have either no effect on students[19] or an effect so tiny as to be unnoticeable.

For the vast majority of her measurements, Gurin reported that even extremely large increases in her "diversity" measurements account for less than 1 percent of students' "learning" outcomes. Put differently, Gurin found that more than 99 percent of a student's "learning" is determined by factors other than her "diversity" measurements.[20] *See* Gurin Rep. App. D, tbls.; *see also* NAS Study, at 80. Only in a handful of cases could Gurin report effects as high as 3 or 4 percent, still exceedingly weak

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[19] Phrased in econometric terms, Gurin found no "statistically significant" results. This means that whatever numbers she found were completely unreliable – they were likely due to random chance, and if she repeated her experiment she would just as likely find no result.

[20] In econometric terms, Gurin found an r^2 value of 1% or less. This means that Gurin's model can explain only 1% (or less) of a student's "learning."

findings. Gurin's "democracy" measurements fared only slightly better. For the vast majority of her measurements, Gurin could account for less than 4 percent of students' "democracy" outcomes. *See* Gurin Rep. App. D, tbls.; *see also* NAS Study, at 80-81.

The Gurin Report is therefore irrelevant to this litigation for two independent reasons: first, because it does not compare student racial diversity to accepted measurements of academic outcomes and, second, because it finds that "diversity experiences" have no effect or only a minuscule effect on students.

III. THE GURIN REPORT VIOLATES BASIC RULES OF STATISTICS AND CONSEQUENTLY YIELDS UNRELIABLE AND CONTRADICTORY RESULTS.

Because the Gurin Report does not deal with student racial diversity or objective academic outcomes and because whatever relationships it does show are so tiny as to be all but immeasurable, it would be irrelevant to this case even if it were methodologically perfect. As the NAS Study demonstrates, however, the Gurin Report falls far short of the mark in this regard as well.

The NAS Study shows that Gurin abandoned two major conventions of statistics, in a way that yields unreliable results. First, without explanation, Gurin replaced the accepted margin of error for surveys (5 percent) with one that allowed her to claim more significant results (10 percent).[21] This allowed Gurin to report more relationships between her "diversity" measurements and her student outcomes, relationships most researchers would deem unreliable and

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[21] In econometric terms, the p value.

likely due to random chance. *See* NAS Study, at 80 (providing a detailed, statistical explanation).

Second, Gurin exaggerated the importance and size of her results. As the NAS Study explains, given Gurin's dataset, the accepted rule (and the rule Alexander Astin followed when he analyzed the same data[22]) indicates that only a fraction of her results are reliable. *See id.* (providing a detailed, statistical explanation).[23]

The inconsistency of Gurin's results further suggests their unreliability. As explained above at note 11, Gurin found that increases in "diversity" lead to Hispanic-American and white students reporting higher grades, but African-American students reporting lower grades. *See* Gurin Rep., at 38; NAS Study, at 91-93. It seems peculiar that the mere presence of students of a different race increases the GPAs of Hispanic-American and white students but deflates the GPAs of African-American students. More likely, these are the type of false results that a statistically flawed study such as Gurin's will produce.

Similarly, "Gurin's models lead to the anomalous conclusion that a one-afternoon workshop produces almost twice the [educational] gains of a whole semester's course work." Thomas E. Wood & Malcolm J. Sherman, *Is Campus Racial Diversity Correlated with Educational Benefits?*, ACADEMIC QUESTIONS, Summer 2001, at 72, 82. "According to Gurin's models, if a student took [a semester-long] ethnic studies class, . . . his . . . listening ability would improve by 2

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[22] *See infra* Part IV.

[23] This measurement of importance or predictive power – or *Beta* coefficient – ranges from 0 to 100%. Astin followed statistical convention and held that only results greater than 15% were reliable; Gurin included all positive results, and thus was able to find more effects than was Astin. *See* NAS Study, at 80.

percent." *Id.* If, on the other hand, that student took only a one-afternoon-long workshop, he would gain 3.5 percent in listening ability. *See id.* Thus, according to Gurin, greater exposure to "diversity" may actually lead to *worse* "learning outcomes."

IV. OTHER SCHOLARSHIP USING GURIN'S PRIMARY DATABASE SHOWS NO RELATIONSHIP BETWEEN STUDENT RACIAL DIVERSITY AND EDUCATIONAL BENEFITS.

If Gurin had wished to measure the effects of student-body racial diversity on academic outcomes, she should have done so. As we have said, this would not have been difficult; Gurin's dataset includes accepted, traditional measurements of both. Although Gurin provides no explanation for why she chose not to use these measurements, a look at Alexander Astin's book *What Matters in College?* may explain.

Using the principal database that Gurin uses – the one that records racial diversity and educational outcomes at 184 colleges and universities – Astin compared percentages of Asian-Americans, African-Americans, and Hispanic-Americans at those colleges and universities with self-reported college grades, college graduation rates, admissions to graduate schools, and performance on seven standardized tests. *See* ALEXANDER W. ASTIN, WHAT MATTERS IN COLLEGE? 62, 188-90 (grades), 191-93 (graduation rates), 197-98 (admissions to graduate school), 199-220 (standardized tests). Astin – who is a supporter of racial preferences – reported that academic "outcomes are generally not affected" by student-body racial diversity, and that any effects "are very weak and indirect." *Id.* at 362. From this Astin concluded: "The values, attitudes, self-concept, and socioeconomic status of the peer group are much more important determinants of how the individual student will develop than are the peer group's abilities, religious

orientation, or *racial composition*." *Id.* at 363 (emphasis added).

Gurin must have been aware of Astin's conclusion, for she cited Astin's book four times in her Report. Gurin Rep. App. B, at 24 (listing studies she reviewed for this litigation); Gurin Rep. App. B, at 14, 18 (listing her review of the literature). Yet Gurin never addressed Astin's contradictory findings in her study.

Since his 1993 study, Astin has reaffirmed these findings. In an interview that appeared in the *Chronicle of Higher Education* in 2001, Astin stated again that the correlation between student-body racial diversity and beneficial academic outcomes "is yet to be convincingly demonstrated," and that "[t]he research still needs to be done that would demonstrate that link." *See* Peter Schmidt, *Debating the Benefits of Affirmative Action*, THE CHRONICLE OF HIGHER EDUCATION, May 18, 2001, at A25 (interview with Alexander Astin).

Despite Astin's repeated statements that neither he nor any other researcher has demonstrated a link between student-body racial diversity and academic outcomes, the district court cited Astin's work as "solid evidence" of this link. Pet. App. 24a-25a. But Astin's own statistical findings, published conclusions, and most recent statement on the matter belie reliance on any link between student racial diversity and educational benefits.

V. THE GURIN REPORT FAILS TO CONSIDER THE POSSIBILITY THAT RACIAL PREFERENCES PRODUCE NEGATIVE EDUCATIONAL EFFECTS.

The University bears a double burden in justifying its racial classifications: it not only must show that student-body racial diversity leads to positive educational outcomes; it also must "demonstrate[ ] that racial preferences, which are

designed to artificially increase [student-body racial] diversity, do not themselves have a *negative* impact on student outcomes." NAS Study, at 83 (emphasis in original); *see also* Zuriff, *supra*, at 275.[24] After all, as the NAS Study points out, "it matters *how racial diversity is achieved.*" NAS Study, at 83 (emphasis in original); *accord* Zuriff, *supra*, at 275.

Neither the district court, nor the Gurin Report on which it relied, considered the possibility that using racial preferences in admissions may have negative effects on students and that these negative effects may outweigh any purported benefits. Given the forceful evidence of such negative effects, this is a major error.

For example, a 1980 study by Stephen Johnson of Ball State University indicates that racial preferences may seriously damage race relations on college campuses. White students participated in an experiment in which an African-American student was rewarded after a test even though it was clear that he had not scored as high as his white competitors. White students responded with sharp hostility and derision toward the African-American student and towards African-Americans in general. Nor could this be attributed to white racism against African-Americans: when a white student lost "because of the other's superior ability," he showed *less* hostility when the superior competitor was African-American than when he was white. Stephen D. Johnson, *Reverse Discrimination and Aggressive Behavior*, 104 J. PSYCHOL. 11, 17 (1980); *see also* PAUL M. SNIDERMAN & EDWARD G. CARMINES, REACHING BEYOND

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[24] "[W]e must distinguish between two types of racial diversity: one that occurs under a race-neutral admissions policy . . . and the other resulting from a policy biased in favor of underrepresented racial and ethnic groups . . . . There is good reason to believe that the two have different effects." *Id.* at 275.

RACE 38-40 (1997) ("[Our experiment demonstrates that] the mere mention of affirmative action turns out to sharpen hostility to blacks."). In a second study, Johnson found that preferential treatment led participants "to feel they had less control over the rewards in their lives," and that their principles of "equity, equality, and need" had been violated. Stephen D. Johnson, *Consequences of Reverse Discrimination*, 47 PSYCH. REPS. 1035, 1037 (1980).

These negative effects are not limited to white students. "[T]he stereotypical thinking that prompts [racial preferences] imposes a greater stigma on its supposed beneficiaries," for it labels them as "less qualified in some respect that is identified purely by their race." *Croson*, 488 U.S. at 516-17 (Stevens, J., concurring) (internal quotation marks and citations omitted). This stigma can negatively affect African-American students' perceptions of themselves and their ability to perform. *See* Linda Hamilton Krieger, *Civil Rights Perestroika: Intergroup Relations After Affirmative Action*, 86 CAL. L. REV. 1251, 1270 (1998); SHELBY STEELE, THE CONTENT OF OUR CHARACTER 117-18 (1990); STEPHEN L. CARTER, REFLECTIONS OF AN AFFIRMATIVE ACTION BABY, 15-16 (1991) (recalling the "insult" he felt when Harvard Law School called to explain that "the school had initially rejected me because 'we assumed from your record you were white,'" but, upon learning his skin color, "was quite happy to scrape me from what it apparently considered somewhere near the bottom of the barrel"); *see also* Peter H. Schuck, *Affirmative Action: Past, Present, and Future*, 20 YALE L. & POL'Y REV. 1, 66-73 (2002) (cataloguing the negative effects of racial preferences on all races).

Even the University's own expert witnesses, William G. Bowen and Derek Bok, have conceded that racial

preferences stigmatize African-American students, both in their own eyes and the eyes of their white classmates.[25]

Despite this forceful evidence, neither the district court, nor the Gurin Report on which it relied, considered the possibility that using racial preferences could have negative effects on students. But Gurin did more than ignore the negative effects of racial preferences; she structured her study to ensure that the negative views of any students who might complain about the University's emphasis on racial diversity are sifted out. First, these students were likely to be categorized as lacking campus "diversity experiences"; then, they were assigned low "democracy outcome" scores. The result is that her study was very unlikely to find students who, despite much exposure to "diversity," reported negative views on, and negative effects from, racial preferences.

For example, one of Gurin's "diversity" measurements asked students if they found that discussions of race with other-race students proved to be "meaningful and honest discussions" in which the student could "[s]hare[ ] personal feelings and problems." Gurin Rep. App. C, at 18. Gurin equated a more positive response with greater exposure to racial diversity at the University. *See*

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[25] *See* WILLIAM G. BOWEN AND DEREK BOK, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS 265 (1998) ("More than a few black students unquestionably suffer some degree of discomfort from being beneficiaries of the admissions process . . . . It is for this reason that many high-achieving black graduates continue to seek reassurance that they have 'made it on their own' and why they complain when job interviewers presume that even the most outstanding black student may well have been helped in this way."); *id.* ("[S]elective institutions have been reluctant to talk about the degree of preference given black students [for fear that] the standing of black students in the eyes of white classmates would be lowered if differences in test scores and high school grades were publicized.").

Gurin Rep., 41, tbls. M3; & M4; Gurin Rep. App. E, at 4. But this ignores those students at the University of Michigan who may believe that racial preferences and a stifling, politically correct environment lead to tense relationships among students.[26] Even if these are the students who have had the most interaction with other-race students at the University, Gurin labels them as not exposed to racial diversity because of their views.[27]

Gurin then used a similar question for her "democracy outcomes." Students were asked if the "University's focus on diversity puts too much emphasis on group differences," "fosters more intergroup division than understanding," "means [students] can't talk honestly about ethnic, racial, and gender issues," and "makes it hard for [students to be themselves]." Gurin Rep. App. C, at 20 (MSS study). If a student reported a hostile racial climate, answering "yes," he received a lower "democracy outcome"

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[26] In his book *Illiberal Education: The Politics of Race and Sex on Campus*, Dinesh D'Souza reported on the racial climate of the University of Michigan during the mid to late 1980s, the same time period covered in Gurin's primary database. D'Souza included an interview with Andrew Milot, a senior at the University who "identified himself as a political liberal, from a 'progressive' family," and a supporter of racial preferences. D'SOUZA, *supra*, at 129. Milot complained of a tense atmosphere, in which students did not feel free to discuss race openly: "It is a shame that the pros and cons of [affirmative action] cannot really be discussed here. . . . There is a censorship going on that's not written. There's a lot of public intimidation." *Id.*

[27] The example of Michigan Professor Reynolds Farley illustrates the ramifications of Gurin's choices. Professor Farley has been "acknowledged as America's leading demographer in the field of race relations" and has taught sociology courses on "racial and cultural contacts." D'SOUZA, *supra*, at 148-49. Presumably Farley spends great amounts of time with people of other races. Yet, because he believes students and professors at the University cannot have open, honest dialogues about affirmative action and race, *see id.* at 150, Gurin would lower his "diversity" score.

score. *See* Gurin Rep. App. D, final regression table, row 4 (indicating that a student who responded that the University's emphasis on group "[d]ifferences is nondivisive" demonstrated a positive "democracy outcome").

Thus, Gurin's study is structured so that many students who have views on racial preferences that contradict Gurin's will first be deemed under-exposed to "diversity," and then fail Gurin's test of good "democracy outcomes." It is little surprise that Gurin did not find many students who, despite great exposure to "diversity," reported negative views on racial preferences or negative "democracy outcomes."[28]

As the NAS Study explains, "Gurin is actually at two removes from the policies she claims to be defending." First, she disregards actual campus racial diversity, and instead considers measurements "not relevant to the issue before the courts." Then, she ignores the critical question of "*how racial diversity is achieved.*" NAS Study, at 83 (emphasis in original). Either of these errors, standing alone, is sufficient to negate the value of Gurin's study.

VI. GURIN ADMITS IN A SUPPLEMENTAL REPORT THAT SHE FAILED TO SHOW THAT STUDENT RACIAL DIVERSITY PRODUCES EDUCATIONAL BENEFITS.

In a Supplemental Report, dated January 11, 2001,[29] Gurin conceded that, contrary to her prior assertions,[30]

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[28] *See* Gurin Rep. App. E, at 2 (finding that over 95% of students reported positive effects from the University's "diversity" courses).

[29] Submitted in companion case *Grutter v. Bollinger*, No. 02-241.

[30] *See, e.g.*, Gurin Rep., at 3 ("A racially and ethnically diverse university student body has far-ranging and significant benefits for all students . . . . Students learn better in a diverse educational environment, and they are better prepared to become active participants in our pluralistic, democratic society once they leave such a setting. . . . This (...continued)

student-body racial diversity alone does not create educational benefits. What her study shows, her most recent statement explains, is that ethnic-studies courses *plus* racial diversity in the student body create educational benefits:

> [Student-body racial diversity] is essential but, by itself, usually not sufficient to produce substantial benefits . . .[;] students from diverse backgrounds must also learn about each other in the courses that they take and in informal interaction outside of the classroom. *For new learning to occur, institutions of higher education have to make appropriate use of [such racial diversity].*

1/11/2001 Gurin Supp. Rep., at 1 (emphasis in original).

According to Gurin, neither factor alone is enough, but together they produce results. But, as shown above, Gurin's study cannot support any conclusions about student-body racial diversity or educational benefits, not even the weaker ones she now offers. *See supra* Parts II & III. The Gurin Report fails to show that racial diversity in the student body (much less racial diversity achieved through racial preferences), creates any educational benefits. Astin's research also belies Gurin's modified claim. *See supra* Part IV. Astin's findings show that *all* of the effects Gurin reports result from taking ethnic-studies courses; increasing racial diversity in the student body had no effect. *See* NAS Study, at 109. Accordingly, even Gurin's weaker, more qualified conclusion is without foundation.

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(...continued)
report describes the strong evidence supporting these conclusions derived from three parallel empirical analyses . . . .").

The district court's and the University's heavy reliance on the Gurin Report was erroneous.

CONCLUSION

For the foregoing reasons, NAS urges this Court to reverse the judgment of the district court.

Respectfully submitted,

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